

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE INDIAN GAMING RELATED CASES

No. C 97-04693 CW

This document
relates to:

COYOTE VALLEY BAND OF POMO INDIANS,

No. C 98-01806 CW

Plaintiffs,

v.

THE STATE OF CALIFORNIA,

Defendant.

AMENDED ORDER
DENYING COYOTE
VALLEY'S MOTION FOR
AN ORDER PURSUANT TO
25 U.S.C.
§§ 2710(d)(7)(B)(iii
) and (iv)

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This complaint was filed pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721. Plaintiff Coyote Valley Band of Pomo Indians (Coyote Valley) moves for an order requiring Defendant State of California to negotiate with it pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii) and (iv). The State opposes the motion. A hearing on the motion was held on February 25, 2000. Having considered all of the papers filed by the parties and oral argument on the motion, the Court denied the motion. This Amended Order supersedes the order previously

1 filed on August 22, 2000.

2 BACKGROUND

3 The State and many Indian tribes have been negotiating for
4 several years over the tribes' right to conduct gaming
5 operations in the State. The negotiations have spawned numerous
6 lawsuits, including many filed in this district. In October,
7 1999, the State and most of the tribes signed gaming compacts.
8 Coyote Valley did not sign a compact. The relevant details of
9 the negotiations between Coyote Valley and the State are
10 discussed as necessary below.

11 DISCUSSION

12 I. Legal Framework

13 In enacting IGRA in 1988, Congress created a statutory
14 framework for the operation and regulation of gaming by Indian
15 tribes. See 25 U.S.C. § 2702. IGRA provides that Indian tribes
16 may conduct certain gaming activities only if authorized
17 pursuant to a valid compact between the tribe and the State in
18 which the gaming activities are located. See id.
19 § 2710(d)(1)(C). If an Indian tribe requests that a State
20 negotiate over gaming activities that are permitted within that
21 State, the State is required to negotiate in good faith toward
22 the formation of a compact that governs the proposed gaming
23 activities. See id. § 2710(d)(3)(A); Rumsey Indian Rancheria of
24 Wintun Indians v. Wilson, 64 F.3d 1250, 1256-58 (9th Cir. 1994).
25 Tribes may bring suit in federal court against a State that
26 fails to negotiate in good faith, in order to compel performance
27 of that duty, see 25 U.S.C. § 2710(d)(7), but only if the State

1 consents to such suit. See Seminole Tribe v. Florida, 517 U.S.
2 44 (1996). The State of California has consented to such suits.
3 See Cal Gov't Code § 98005; Hotel Employees & Restaurant
4 Employees Int'l Union v. Davis, 21 Cal. 4th 585, 614-15 (1999).

5 IGRA defines three classes of gaming on Indian lands, with
6 a different regulatory scheme for each class. Class III gaming
7 is defined as "all forms of gaming that are not class I gaming
8 or class II gaming." 25 U.S.C. § 2703(8). Class III gaming
9 includes, among other things, slot machines, casino games,
10 banking card games, dog racing and lotteries. Class III gaming
11 is lawful only where it is (1) authorized by an appropriate
12 tribal ordinance or resolution; (2) located in a State that
13 permits such gaming for any purpose by any person, organization
14 or entity; and (3) conducted pursuant to an appropriate
15 tribal-State compact. See id. § 2710(d)(1).

16 IGRA prescribes the process by which a State and an Indian
17 tribe are to negotiate a gaming compact:

18 Any Indian tribe having jurisdiction over the Indian
19 lands upon which a class III gaming activity is being
20 conducted, or is to be conducted, shall request the
21 State in which such lands are located to enter into
22 negotiations for the purpose of entering into a
Tribal-State compact governing the conduct of gaming
activities. Upon receiving such a request, the State
shall negotiate with the Indian tribe in good faith to
enter into such a compact.

23 Id. § 2710(d)(3)(A). IGRA enumerates several types of
24 provisions that may be addressed in gaming compacts. See id.
25 § 2710(d)(3)(C).

26 If a State fails to negotiate in good faith, the Indian
27 tribe may, after the close of the 180-day period beginning on
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1 the date on which the Indian tribe requested the State to enter
2 into negotiations, initiate a cause of action in a federal
3 district court. See id. § 2710(d)(7)(A)(i). In such an action,
4 the tribe must first show that no tribal-State compact has been
5 entered into and that the State failed to respond in good faith
6 to the tribe's request to negotiate. See id.
7 § 2710(d)(7)(B)(ii). Assuming the tribe makes this prima facie
8 showing, the burden then shifts to the State to prove that it
9 did in fact negotiate in good faith. See id.¹ If the district
10 court concludes that the State failed to negotiate in good
11 faith, it "shall order the State and Indian Tribe to conclude
12 such a compact within a 60-day period." Id.
13 § 2710(d)(7)(B)(iii). If no compact is entered into within the

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15 ¹Specifically, IGRA provides:

16 (i) An Indian tribe may initiate a cause of
17 action [to compel the State to negotiate in good faith]
18 only after the close of the 180-day period beginning on
19 the date on which the Indian tribe requested the State
20 to enter into negotiations under paragraph (3)(A).

21 (ii) In any action [by an Indian tribe to
22 compel the State to negotiate in good faith], upon the
23 introduction of evidence by an Indian tribe that--

24 (I) a Tribal-State compact has not been
25 entered into under paragraph (3), and

26 (II) the State did not respond to the
27 request of the Indian tribe to negotiate such a
28 compact or did not respond to such request in good
faith,

the burden of proof shall be upon the State to prove
that the State has negotiated with the Indian tribe in
good faith to conclude a Tribal-State compact governing
the conduct of gaming activities.

Id. § 2710(d)(7)(B).

1 next sixty days, the Indian tribe and the State must then each
2 submit to a court-appointed mediator a proposed compact that
3 represents their last best offer. See id. § 2710(d)(7)(B)(iv).
4 The mediator chooses the proposed compact that "best comports
5 with the terms of [IGRA] and any other applicable Federal law
6 and with the findings and order of the court." See id. If,
7 within the next sixty days, the State does not consent to the
8 compact selected by the mediator, the mediator notifies the
9 Secretary of the Interior, who then prescribes the procedures
10 under which class III gaming may be conducted. See
11 id. § 2710(d)(7)(B)(vii).

12 II. Issues Presented

13 Coyote Valley argues that the State did not negotiate in
14 good faith. Coyote Valley's arguments can be divided into
15 procedural and substantive objections to the State's conduct.
16 Procedurally, Coyote Valley argues that the State, particularly
17 under the Wilson administration but also under the current Davis
18 administration, unreasonably delayed the initiation of
19 negotiations, and repeatedly refused timely to meet with tribal
20 representatives. Coyote Valley further argues that the State
21 made its offers contingent on nearly immediate acceptance, which
22 exerted a coercive force on the tribes. According to Coyote
23 Valley, the State also took advantage of threats of forfeiture
24 actions against the tribes by the United States Attorney.
25 Finally, Coyote Valley argues that the State made its offer
26 contingent upon the Agua Caliente Tribe ceasing its efforts to
27 place on the March, 2000 ballot an Indian gaming initiative that

1 would have competed with the State-sponsored gaming initiative.
2 Substantively, Coyote Valley argues that the State refuses to
3 enter into any compact with a tribe unless the tribe accepts
4 State taxation on gaming revenues and enacts a specific tribal
5 labor relations ordinance.

6 III. Procedural Issues

7 Any delays in the negotiations do not constitute bad faith.
8 First, the Court accords the arguments concerning the Wilson
9 administration little weight. Although IGRA does not specify
10 the time period that should be evaluated in determining whether
11 a State negotiated in good faith, common sense dictates that a
12 State that has, in the recent past, negotiated in good faith
13 should not be compelled to submit to the procedures set forth in
14 25 U.S.C. § 2710(d)(7)(B)(iii) and (iv) based on its conduct in
15 the more distant past. With regard to the State's negotiations
16 under the Davis administration, the record reflects that both
17 parties at times were less than diligent in responding to the
18 other's correspondence and requests. Any delays that may have
19 been caused by the State do not rise to the level of bad faith.

20 The deadline imposed by the State for accepting its offer
21 presents a closer question, but also does not evidence bad
22 faith. The parties were operating under time pressures exerted
23 by a number of forces, including the impending end of a State
24 legislative session. While it might have been better had the
25 State made its offer sooner, and provided the tribes with a
26 longer period of time in which to consider the offer, it was
27 under no obligation to do so.

1 Coyote Valley's objections to the demands that the State
2 made of the Agua Caliente Tribe are unavailing. Had the Agua
3 Caliente Tribe refused to accede to the State's demand regarding
4 that tribe's proposed ballot initiative, and had the State then
5 refused to negotiate a gaming compact with any tribe, Coyote
6 Valley would be entitled to argue that the State did not act in
7 good faith in its negotiations with Coyote Valley. However,
8 that is not what happened. The Agua Caliente Tribe did cease
9 its efforts regarding its proposed ballot initiative, and the
10 State did negotiate with Coyote Valley and the other tribes.
11 Regardless of whether the State's demands of the Agua Caliente
12 Tribe were improper, Coyote Valley lacks standing to object to
13 them; assuming the State's conduct is evidence of bad faith, it
14 is evidence of bad faith in the negotiations between the State
15 and the Agua Caliente Tribe, not the negotiations between the
16 State and Coyote Valley.

17 Finally, the State cannot be held accountable for the
18 conduct of the United States Attorney. Coyote Valley offers no
19 evidence that the State conspired with the United States
20 Attorney. Although Coyote Valley may believe the United States
21 Attorney's conduct was improper, that purported impropriety
22 cannot be imputed to the State.

23 IV. Substantive Issues

24 Coyote Valley argues that the proposed compact improperly
25 requires tribes to make certain contributions to two State-
26 controlled funds, and to enact a specific tribal labor relations
27 ordinance. Coyote Valley contends that these provisions are not
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1 within the scope of allowable subject matter for gaming
2 compacts. In the alternative, Coyote Valley argues that the
3 positions adopted by the State on these issues demonstrate bad
4 faith.

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1 A. Challenged Provisions

2 1. Revenue Sharing Trust Fund

3 Coyote Valley objects to the provisions in the proposed
4 compact that create a "Revenue Sharing Trust Fund." The Revenue
5 Sharing Trust Fund provisions apply only to the operation of
6 gaming devices beyond the maximum number of devices normally
7 allowed. See Norris Dec., Ex. D (proposed compact) § 4.3.2.2.
8 Coyote Valley does not, for the purposes of this motion,
9 challenge the propriety of the proposed compact's limits on the
10 number of gaming devices.² The compact provides that tribes that
11 sign it may, by a certain procedure, obtain licenses to operate
12 more than the usually allowed number of gaming devices. See
13 Proposed Compact § 4.3.2.2(a). These licenses come from a
14 State-wide pool of licenses, the size of which is determined by
15 a formula that takes into account the number of tribes in the
16 State that either are not operating any gaming devices, or are
17 operating fewer than 350 such devices. See id. § 4.3.2.2(a)(1).
18 The compact deems such tribes to be third-party beneficiaries of
19 the compact, and the Revenue Sharing Trust Fund is used to make
20 certain payments to these tribes. See id. §§ 4.3.2(a)(i) &
21 4.3.2.1. Although the Revenue Sharing Trust Fund is held in
22 trust by the State, see id. § 4.3.2(a)(ii), the State cannot use
23 the Revenue Sharing Trust Fund for any purpose other than to
24 make the payments set forth in § 4.3.2.1. See id. § 4.3.2.1.
25 In substance, the compact sets up a procedure by which tribes

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27 ²Coyote Valley does reserve the right to challenge this
28 limit in future negotiations with the State.

1 that have signed the proposed compact can license other tribes'
2 right to operate gaming devices.

3 2. Special Distribution Fund

4 Coyote Valley also objects to the provisions in the
5 proposed compact that create a "Special Distribution Fund."
6 Unlike the Revenue Sharing Trust Fund payments, which are not
7 based on the revenue generated by a tribe's gaming facilities,
8 the Special Distribution Fund payments are calculated as a
9 percentage of the "average gaming device net win." See id.
10 § 5.1(a). The compacts incorporate the definition of "net win"
11 used by the American Institute of Certified Public Accountants.
12 See id. § 2.15. The payments are made according to a graduated
13 schedule, based on the total number of gaming devices in
14 operation. See id. § 5.1(a). No payments are required for
15 operation of the first 200 gaming devices. See id. For the
16 next 300 gaming devices, the tribe must make a payment to the
17 Special Distribution Fund equivalent to 7% of the average gaming
18 device net win. For the next 500 gaming devices, a 10% payment
19 is required, and for any additional devices, a 13% payment is
20 required.

21 The Special Distribution Fund is available for
22 appropriations by the State legislature for

- 23 (a) grants, including any administrative costs, for
24 programs designed to address gambling addiction;
25 (b) grants, including any administrative costs, for the
26 support of state and local government agencies impacted
27 by tribal government gaming; (c) compensation for
28 regulatory costs incurred by the State Gaming Agency
and the state Department of Justice in connection with
the implementation and administration of the Compact;
(d) payment of shortfalls that may occur in the Revenue

Sharing Trust Fund; and (e) other purposes specified by the Legislature.

Id. § 5.2. The compact states that the parties intend that tribes that have entered into compacts with the State will be consulted during the appropriation process, see id., but does not expressly require such consultation.

3. Tribal Labor Relations Ordinance

Finally, Coyote Valley objects to § 10.7 of the proposed compact, which renders the compact null and void unless the tribe provides the State with

an agreement or other procedure acceptable to the State for addressing organizational and representational rights of Class III Gaming Employees and other employees associated with the Tribe's Class III gaming enterprise, such as food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility or any related facility, the only significant purpose of which is to facilitate patronage at the Gaming Facility.

Id. § 10.7. According to Coyote Valley, the only such agreement or procedure that is acceptable to the State is one that is identical, in all material respects, to a Tribal Labor Relations Ordinance that was developed during compact negotiations. The State asserts that the Tribal Labor Relations Ordinance is the product of negotiations between the tribes and the unions and that the ordinance imposes only minimal obligations on tribes that enact it.

B. Allowable Subject Matter for Gaming Compacts

IGRA provides that a gaming compact may include provisions relating to

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that

are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C).

The Court reads § 2710(d)(3)(C), and specifically § 2710(d)(3)(C)(vii), more broadly than Coyote Valley does. The committee report of the Senate Select Committee on Indian Affairs describes the subparts of § 2710(d)(3)(C) as "broad areas." See S. Rep. No. 100-446, at 14 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3084. Consistent with this description, the Court interprets "subjects that are directly related to the operation of gaming activities" to include any subject that is directly connected to the operation of gaming facilities.

Not all such subjects are included within § 2710(d)(3)(C)(vii), because that subpart is limited to subjects that are "directly" related to the operation of gaming

1 activities. The committee report notes that Congress did "not
2 intend that compacts be used as a subterfuge for imposing State
3 jurisdiction on tribal lands." Id. The Court concludes that it
4 was this concern that led Congress to limit the scope of
5 § 2710(d)(3)(C)(vii) to subjects that are "directly" related to
6 the operation of gaming activities. States cannot insist that
7 compacts include provisions addressing subjects that are only
8 indirectly related to the operation of gaming facilities.

9 Given the Court's interpretation of § 2710(d)(3)(C), Coyote
10 Valley's argument that the challenged provisions of the proposed
11 compact fall outside the scope of § 2710(d)(3)(C) lacks merit.
12 The Revenue Sharing Trust Fund provisions are licensing
13 provisions, and thus are authorized by § 2710(d)(3)(C)(vi).
14 See S. Rep. No. 100-446 at 14, 1998 U.S.C.C.A.N. at 3085
15 (discussing the broad scope of subpart (vi)). The Revenue
16 Sharing Trust Fund only applies if a tribe wants more gaming
17 licenses than it otherwise would be entitled to under the
18 proposed compact. The proposed compact provides a mechanism
19 whereby a tribe can get more licenses by, in effect, using the
20 licenses of tribes who have not, for whatever reason, engaged in
21 gaming activities. These non-gaming tribes are compensated for
22 the use of their licenses through the Revenue Sharing Trust
23 Fund.

24 Because the Revenue Sharing Trust Fund is a licensing
25 provision, authorized under § 2710(d)(3)(C)(vi), it is not
26 barred by § 2710(d)(4). Furthermore, the inclusion of this
27 licensing provision in the proposed compact cannot be considered

1 evidence of a lack of good faith on the part of the State under
2 § 2710(d)(7)(B)(iii)(II). Not only is the Revenue Sharing Trust
3 Fund not direct taxation of the tribe or tribal lands, it was
4 not a "demand" of the State. See § 2710(d)(7)(B)(iii)(II).
5 Rather, the concept of gaming tribes paying non-gaming tribes
6 originated in Proposition 5, which was written and supported by
7 California tribes, and was suggested to the State by the tribes
8 during negotiations. See Norris Decl. (filed on February 4,
9 2000, in support of State's Opposition) at ¶ 15.

10 The Special Distribution Fund is created for the purpose of
11 covering the State's costs of overseeing gaming operations and
12 programs addressing secondary effects of gaming operations, such
13 as gambling addiction. Coyote Valley argues that the State may
14 appropriate monies from the Special Distribution Fund for any
15 purpose, because § 5.2(e) of the proposed compact allows use of
16 such funds for "other purposes specified by the Legislature."
17 However, the "other purposes" clause follows four other
18 enumerated purposes for the Special Distribution Fund, each of
19 which is directly related to gaming. Under the principle of
20 ejusdem generis, "a general term following more specific terms
21 means that the things embraced in the general term are of the
22 same kind as those denoted by the specific terms." See United
23 States v. Lacy, 119 F.3d 742, 748 (9th Cir. 1997) (quotation
24 marks and citation omitted). The Court thus construes the
25 "other purposes" listed in § 5.2(e) of the proposed compact to
26 be limited to other purposes that, like the first four
27 enumerated purposes, are directly related to gaming.

1 The subject matter of the Special Distribution Fund is
2 within the scope of § 2710(d)(3)(C)(iii) (compacts may include
3 an "assessment by the State . . . in such amounts as are
4 necessary to defray the costs of regulating" gaming operations);
5 see also California v. Cabazon Band of Mission Indians, 480 U.S.
6 202, 208-11 (1987) (Cabazon Band I) (in the context of Indian
7 law, restrictions other than those that broadly prohibit a class
8 of conduct are "regulatory"); S. Rep. No. 100-446, at 6, 1998
9 U.S.C.C.A.N. at 3076 (Senate Committee expects federal courts to
10 rely on the prohibitory/regulatory distinction discussed in
11 Cabazon Band I). Accordingly, the Special Distribution Fund is
12 not barred by § 2710(d)(4). Nor is the inclusion of this
13 provision in the proposed compact evidence of a lack of good
14 faith on the part of the State under § 2710(d)(7)(B)(iii)(II)
15 because it is not a direct tax on the tribe or tribal lands.

16 Finally, labor relations at gaming facilities and closely
17 related facilities, which is the subject governed by the Tribal
18 Labor Relations Ordinance, is a subject that is "directly
19 related to the operation of gaming activities." 25 U.S.C.
20 § 2710(d)(3)(C)(vii).

21 C. Preemption and Tribal Sovereignty

22 Coyote Valley's final argument is that the challenged
23 provisions of the proposed compact, even if not per
24 se prohibited as exceeding the scope of 25 U.S.C.
25 § 2710(d)(3)(C), impose an unreasonable burden on the tribe.
26 According to Coyote Valley, the challenged provisions cannot be
27 justified under the balancing test discussed by the Ninth

1 Circuit in Crow Tribe of Indians v. Montana, 650 F.2d 1104 (9th
2 Cir. 1981) (Crow Tribe I), Crow Tribe of Indians v. Montana, 819
3 F.2d 895 (9th Cir. 1987), aff'd, 484 U.S. 997 (1988) (mem.)
4 (Crow Tribe II), and Cabazon Band of Mission Indians v. Wilson,
5 37 F.3d 430 (9th Cir. 1994) (Cabazon Band II). Coyote Valley
6 and amicus curiae Agua Caliente Band of Cahuilla Indians also
7 cite a recent decision by the Tenth Circuit Court of Appeals,
8 NLRB v. Pueblo of San Juan, 2000 WL 1410839, in support of their
9 argument that a State cannot impose a labor relations ordinance
10 on an unwilling tribe. Coyote Valley argues that the State's
11 insistence on the challenged provisions is evidence of bad
12 faith.

13 1. Tribal Sovereignty and the Balancing of Interests

14 In Crow Tribe I, the Ninth Circuit reversed the dismissal
15 of a lawsuit brought to enjoin the application of Montana's coal
16 mining tax to coal mining on Crow Tribe land. The court held
17 that the Crow Tribe had "alleged facts that, if proved, would
18 establish that the taxes are preempted [by federal law, and]
19 infringe upon the Tribe's right to govern itself." 650 F.2d at
20 1107.

21 In Crow Tribe II, an appeal after a judgment in favor of
22 the State on the merits in the same case, the court explained
23 that a State law that interferes with tribal or federal
24 interests will apply to on-reservation activities only if the
25 State law is carefully tailored to support legitimate State
26 interests that are substantial enough to justify the
27 interference with tribal or federal interests. See 819 F.2d at
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1 898-901. The court further held that, even if application of a
2 State law is not barred based on a preemption analysis, the
3 State law nonetheless cannot apply to on-reservation activities
4 if such application would infringe tribal sovereignty. See id.
5 at 902. "The principle of self-government is to seek 'an
6 accommodation between the interests of the Tribes and the
7 Federal Government, on the one hand, and those of the State, on
8 the other.'" Id. (quoting Washington v. Confederated Tribes of
9 the Colville Indian Reservation, 447 U.S. 134, 156 (1980)).

10 In Cabazon Band II, the Ninth Circuit, after balancing the
11 federal, tribal and State interests at stake, held that a
12 California tax on off-track betting operations could not be
13 applied to such operations on tribal lands, where the gaming
14 compact governing those operations did not expressly allow for
15 such a tax. See 37 F.3d at 433-35.

16 In Pueblo of San Juan, the Tenth Circuit found that "the
17 NLRA does not preempt a tribal government from the enactment and
18 enforcement of a right-to-work tribal ordinance applicable to
19 employees of a non-Indian company who enters into a consensual
20 agreement with the tribe to engage in commercial activities on a
21 reservation." 2000 WL 1410839 at *8. Coyote Valley and amicus
22 curiae argue that this holding should be read to prohibit a
23 State from imposing its labor relations laws or requirements on
24 a tribe.

25 However, even if Pueblo of San Juan can be read to support
26 such a proposition, it, along with Crow Tribe I, Crow Tribe
27 II and Cabazon Band II, does not support the tribe's argument.

1 In Crow Tribe I, Crow Tribe II and Cabazon Band II, the State
2 restrictions at issue were unilaterally imposed by the State,
3 and were not authorized by federal law. In the case at bar, the
4 State cannot unilaterally impose the challenged provisions
5 regarding assessments and labor organization on Coyote Valley,
6 but can only propose terms for a gaming compact that will not
7 take effect unless Coyote Valley agrees to them. Even if Coyote
8 Valley and the State sign a compact, it cannot take effect
9 unless approved by the Secretary of the Interior. Although, as
10 a matter of tribal sovereignty, the State may not be able to
11 impose taxes or labor relations requirements on a tribe absent
12 an agreement, that is not dispositive of whether the State
13 lacked good faith in negotiating for or even insisting on the
14 challenged provisions in the proposed compact, which the tribes
15 could choose to enter into.

16 Because no compact can take effect without the consent of
17 federal, tribal and State representatives, no enforceable
18 compact can run afoul of the balancing test upon which Coyote
19 Valley relies. Moreover, the committee report states that IGRA
20 "is intended expressly to preempt the field in the governance of
21 gaming activities on Indian lands. Consequently, Federal courts
22 should not balance competing Federal, State, and tribal
23 interests to determine the extent to which various gaming
24 activities are allowed." S. Rep. No. 100-446, at 6, 1998
25 U.S.C.C.A.N. at 3076. For these reasons, the Court concludes
26 that the balancing test applicable to State attempts
27 unilaterally to enforce restrictions on on-reservation

1 activities does not apply to a State's proposed terms for a
2 gaming compact.

3 2. Good Faith Standard

4 However, the substance of Coyote Valley's argument is that
5 the challenged provisions are unreasonable. The question the
6 Court must resolve is whether the State's negotiating position
7 is so unreasonable that it can be said that the State has not
8 negotiated in good faith. IGRA does not expressly define "good
9 faith," and neither party has proposed a standard by which the
10 Court should determine whether the State has negotiated in good
11 faith.

12 The Court looks for guidance to case law interpreting the
13 National Labor Relations Act (NLRA). Like IGRA, the NLRA
14 imposes a duty to bargain in good faith, but does not expressly
15 define "good faith." See 29 U.S.C. § 158(d). The Supreme Court
16 has held that this duty "requires more than a willingness to
17 enter upon a sterile discussion of" the parties' differences.
18 See NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402 (1952).
19 Instead, the parties must "enter into discussions with an open
20 and fair mind and a sincere purpose to find a basis for
21 agreement." Seattle-First Nat'l Bank v. NLRB, 638 F.2d 1221,
22 1227 n.9 (9th Cir. 1981) (quoting NLRB v. Holmes Tuttle Broadway
23 Ford, Inc., 465 F.2d 717, 719 (9th Cir. 1972)). The Court does
24 not intend to import federal case law interpreting the NLRA
25 wholesale into its interpretation of the IGRA. Obviously, the
26 relationship of employers to unions is not analogous to that of
27 the States to tribes. However, the Court considers the NLRA

1 case law for guidance in interpreting a standard undefined by
2 the IGRA.

3 The Court concludes that the State has negotiated with
4 Coyote Valley in good faith. First, the State did not have to
5 allow the tribes to engage in class III gaming at all. The
6 Ninth Circuit has held that the State has no duty to negotiate
7 over gaming not allowed by State law. See Rumsey, 64 F.3d at
8 1256. Class III gaming was illegal under California law until
9 the State constitution was amended to grant compacted tribes the
10 exclusive right to engage in it. Such gaming is still illegal
11 in California for everyone but compacted tribes.

12 Second, the challenged provisions are the result of tribal-
13 State and tribal-union negotiations, not unilateral demands by
14 the State. The Tribal Labor Relations Ordinance is the product
15 of negotiations between the tribes and union representatives.
16 See Harvey Decl. (filed on February 2, 2000 in support of
17 State's Opposition) at ¶¶ 4-5. In deference to the sovereignty
18 concerns of several tribes, the State agreed to the tribes'
19 request not to place the labor provisions directly in the
20 compact. See id. at ¶ 5. The Tribal Labor Relations Ordinance
21 provides for relatively minimal organizational rights such as
22 the right to engage in collective bargaining if the union
23 becomes the exclusive collective bargaining representative by
24 winning an election. See id. at ¶ 6; id., Exh. A. Among other
25 provisions beneficial to the tribes, the Tribal Labor Relations
26 Ordinance prohibits unions from interfering with a Tribal Gaming
27 Commission's regulation of its gaming operations, allows for

1 employment preferences for Native Americans, limits a union's
2 right to strike, and prohibits strike-related pickets on tribal
3 land. See id. at ¶ 7; id., Exh. A. As noted above, the Revenue
4 Sharing Trust Fund had its origins in Proposition 5, which was
5 written and supported by California tribes, and was suggested to
6 the State by the tribes during negotiations. See Norris Decl.
7 at ¶ 15.

8 Third, in response to the State's proposed compact, Coyote
9 Valley counter-offered with a modified compact that, among other
10 things, deleted the challenged provisions entirely, while
11 retaining--and, in fact, enlarging--other aspects of the
12 proposed compact favorable to it. See Chang Dec., Ex. I (red-
13 lined comparison between the State's proposed compact and Coyote
14 Valley's counter-offer). That is, Coyote Valley took the
15 position that the compact should not address at all the subjects
16 encompassed by the challenged provisions. As explained above,
17 Coyote Valley's position that the challenged provisions address
18 subjects outside the permissible scope of gaming compacts is
19 incorrect. The State thus did not act in bad faith by refusing
20 to accept the tribe's counter-offer.

21 Finally, although the State has indicated a willingness to
22 negotiate further over the challenged provisions, see id., Ex. J
23 at 3 (Dec. 3, 1999 letter), Coyote Valley apparently has not
24 contacted the State to arrange any further negotiations. See
25 id., Ex. K; Norris Dec. ¶ 24. Having declined to engage in
26 further negotiations over the challenged provisions, Coyote
27 Valley cannot reasonably assert that the State's failure to
28

1 alter those terms constitutes a refusal to negotiate in good
2 faith.

3 In summary, the Court concludes that Coyote Valley has thus
4 far chosen to limit its negotiations with the State with regard
5 to the challenged provisions to the issue of whether the
6 provisions are per se unreasonable, based on its position that
7 these provisions address subjects not allowable in a gaming
8 compact. The Court further concludes that Coyote Valley's
9 position is incorrect. Because Coyote Valley's only counter-
10 offer to the proposed compact is premised on this legally
11 incorrect position, the State did not act in bad faith by
12 refusing to accept the counter-offer. In the context of the
13 totality of the negotiations and the resultant compact proposed
14 by the State, the Court concludes that the State negotiated in
15 good faith with Coyote Valley.

16 CONCLUSION

17 For the foregoing reasons, the Court DENIES Coyote Valley's
18 motion for an order requiring the State to negotiate with Coyote
19 Valley pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii) and (iv)
20 (Docket No. 51). Judgment shall enter accordingly. The Clerk
21 shall close the file.

22 IT IS SO ORDERED.
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1 Dated:

CLAUDIA WILKEN
United States District
Judge

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5 Copies mailed to counsel
6 as noted on the following page
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